Filed 1/8/09 In re D.L. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re D.L., a Person Coming Under the Juvenile Court Law.	B205263 (Los Angeles County Super. Ct. No. CK70031)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.F., Defendant and Appellant; D.L., Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Margaret S. Henry, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant J.F.

Aida Aslanian, under appointment by the Court of Appeal, for Appellant D.L. (minor).

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

Appellants J.F. (father) and D.L. (minor)[1] (born June 2007) appeal from the juvenile court's jurisdictional and dispositional orders establishing dependency jurisdiction over minor pursuant to Welfare and Institutions Code section 300, subdivision (b)[2] and removing minor from father's custody. We affirm the orders.

BACKGROUND

On September 10, 2007, the Department of Children and Family Services (DCFS) received two related referrals alleging that minor's 15-year-old mother, J.M. (mother), had been sexually abused by father, who was then 22 years old. The referral arose out of an altercation between father and minor's maternal grandmother (grandmother) that occurred at mother's school on August 28, 2007. Father had driven mother to school that day, and the couple told a school counselor that they had a child together. Grandmother arrived at the school and became upset when she learned the parents had disclosed father's paternity. Grandmother yelled at father, hit him, and threw a glass bottle at him. Hawthorne police officers responded to the disturbance, and the officers notified the Los Angeles County Sheriff's Department. Father was subsequently arrested and charged with a violation of Penal Code section 261.5 (unlawful sexual intercourse with a minor). Mother was detained and placed in foster care. Minor was not detained, but remained in mother's custody in the foster home.

In a September 17, 2007 interview, mother told a DCFS social worker that she and father had lived together in grandmother's home for two years, and that grandmother was aware of the couple's sexual relationship. On September 21, 2007, DCFS filed a petition

---

[1] Father and minor are referred to collectively as appellants.

[2] All further statutory references are to the Welfare and Institutions Code, unless stated otherwise.

under section 300, subdivisions (b) and (d), alleging that father had sexually abused mother by engaging in ongoing sexual intercourse with her since she was 13 years old, resulting in her pregnancy and the birth of minor when mother was age 15.

Father was present, in custody, at the September 21, 2007 detention hearing. The juvenile court found a prima facie case existed for detaining minor from father and ordered minor released to mother. The juvenile court ordered no visits for father while he was in custody, but allowed monitored visits once he was released from custody, so long as mother was not present during the visits.

1. October 18, 2007 and November 9, 2007 Pretrial Resolution Conference Hearing

In October 2007, DCFS reported that both father and mother admitted having consensual sexual relations with each other since mother was 13 years old. Father stated: "Yes I knew it was against the law for me to be with [mother], but I guess I just fell in love and thought it was worth it." Father said he wanted to provide for minor and mother, whom he referred to as his "wife," and expressed the desire to marry her.

On November 7, 2007, father pled guilty to a violation of Penal Code section 288, subdivision (a).[3] As part of his plea agreement, father agreed to complete a 52-week parent education course and to five years of formal probation. At a November 9, 2007 pretrial hearing, father's counsel advised the juvenile court of father's guilty plea under Penal Code section 288, subdivision (a). The parties then discussed the applicable legal standard for determining juvenile court jurisdiction when a parent has been convicted of a sexual offense. The parties agreed that under section 355.1, subdivision (d), father's conviction under Penal Code section 288, subdivision (a) was prima facie evidence that minor was a person described under section 300, subdivisions (a) through (d), and that father bore the burden of producing evidence that he was not a risk to minor.

At the November 30, 2007 trial setting conference, father's counsel requested a continuance in order to have father evaluated by an expert to determine whether father would be a risk to minor. The juvenile court offered the following input on the matter:

---

[3] Penal Code section 288, subdivision (a) makes it a felony to commit "any lewd or lascivious act . . . upon . . . a child who is under the age of 14 years . . . ."

"As I see it, it's going to be an issue of his judgment. I'm not worried about him molesting his son. I don't think that is going to be an issue. It will be a question of whether he has adequate judgment to be left alone with the child or not to be a danger to a child, that is what your expert better be testified to."

2. Jurisdictional/Dispositional Hearing

At the January 18, 2008 combined jurisdiction/disposition hearing, the juvenile court admitted documentary evidence, including DCFS's reports and case file. The juvenile court took judicial notice of the section 300 petition and certain orders issued in mother's related dependency case. The court also took judicial notice of the sentencing order issued in father's criminal case placing father on probation for five years and requiring father to register as a sex offender.

At the hearing, Dr. Marshall Cherkes testified on father's behalf as an expert witness in the area of sexual abuse.[4] He said that father recognized his sexual relationship with mother was wrong, and that father had learned from his mistakes and wanted to marry mother and care for their child. Cherkes stated that he did not believe father lacked the decision-making ability to care for minor, or that father would parent minor poorly or place minor at risk of sexual abuse or serious physical harm. Cherkes acknowledged, however, that father had exercised poor judgment by having sexual relations with a 13-year-old, and by disclosing his paternity to a counselor at mother's school. Cherkes also acknowledged that father demonstrated a lack of understanding as to what constituted age appropriate conduct for a child. Cherkes stated that although he did not believe minor would be in physical danger if placed with father, he was not recommending that the child be placed with father at this time. He further stated that father's contact with minor should be supervised.

---

[4] Father also sought to have Cherkes qualified as an expert in general psychiatry, but DCFS objected on the ground that the scope of Cherkes's evaluation of father was limited to sexual abuse and was not a general psychiatric evaluation. The record contains no ruling by the juvenile court on this issue.

DCFS investigator, Hector Alvarez, testified that he did not believe father would sexually abuse minor or allow minor to be sexually abused. Alvarez further testified that he did not believe father's actions would cause minor to be physically harmed. Alvarez stated, however, that father's decision to engage in sexual relations with a 13-year-old child was evidence of poor judgment and his inability to understand the developmental stages of a child and what would be age appropriate for minor. Alvarez expressed the opinion that until father complied with the conditions of his probation, which included a 52-week parenting course and individual counseling to address sexual abuse issues, and had participated in monitored visits with minor, there was a substantial risk that minor would suffer harm under father's care.

After hearing argument from the parties, the juvenile court found that father had failed to produce evidence sufficient to rebut the presumption, under section 355.1, subdivision (d), that his status as a convicted sex offender was prima facie evidence that minor was a person described under section 300. The juvenile court struck the section 300, subdivision (d) allegation and amended the petition to state that father had demonstrated lack of judgment regarding children, and that father is a registered sex offender, pled guilty, and was convicted under Penal Code section 288, subdivision (a). The court then found, by a preponderance of the evidence, that the amended petition was true. The court further found, by clear and convincing evidence pursuant to section 361, subdivision (c), that a substantial danger existed to the physical health, safety, protection, physical or emotional well-being of minor if the child were to be returned to father's custody, and that there was no reasonable means to protect minor without removing him from father's custody. This appeal followed.

DISCUSSION

I. Standard of Review

We review the juvenile's court's jurisdictional and dispositional findings under the substantial evidence standard. (*In re David M.* (2005) 134 Cal.App.4th 822, 829; *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1078.) Under this standard, we review the record to determine whether there is any reasonable, credible, and solid

evidence to support the juvenile court's conclusions, resolve all conflicts in the evidence, and make all reasonable inferences from the evidence in support of the court's orders. (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393.)

II. Jurisdictional Findings

Section 300, subdivision (b) accords the juvenile court jurisdiction over a child if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child . . . ."

Section 355.1, subdivision (d) creates a presumption of dependency jurisdiction when a parent has been previously convicted of sexual abuse or is required to register as a sex offender. The statute provides in relevant part: "Where the court finds that . . . a parent . . . who resides with, or has the care or custody of, a minor who is currently the subject of the petition filed under Section 300 . . . has been previously convicted of sexual abuse as defined in Section 11165.1 of the Penal Code,[5] . . . has been found in a prior dependency hearing . . . to have committed an act of sexual abuse, or . . . is required, as the result of a felony conviction, to register as a sex offender pursuant to Section 290 of the Penal Code, that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence." (§ 355.1, subd. (d).)

The presumption created by section 355.1, subdivision (d) is not conclusive. Rather, it is a rebuttable presumption that affects only the burden of producing evidence. (*In re John S.* (2001) 88 Cal.App.4th 1140, 1145.) As the legislative history to the statute makes clear: "The burden of producing evidence is a lower standard than the burden of proof. The burden to produce evidence means producing some evidence, even though the evidence may fall short of convincing the court to agree with the party bringing the

---

[5] Penal Code section 11165.1, subdivision (a), defines sexual abuse to include conduct in violation of Penal Code section 288, subdivision (a).

evidence. The standard is the same as evidence sufficient to avoid summary judgment during a pretrial hearing. A party having the burden of proof, must provide sufficient evidence to convince the court, usually by a preponderance, to find in its favor." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 208 (1999-2000 Reg. Sess.) as amended May 13, 1999, p. 3.)

Appellants acknowledge that father's conviction under Penal Code section 288, subdivision (a) gave rise to a rebuttable presumption, under section 355.1, subdivision (d), that minor was a person described under section 300, subdivision (b) and at substantial risk of abuse or neglect.[6] (§ 355.1, subd. (d); *In re John S., supra*, 88 Cal.App.4th at p. 1145.) They contend, however, that the juvenile court erred by treating the statutory presumption as conclusive, rather than as a rebuttable one and that father presented evidence sufficient to rebut the presumption.

Father presented sufficient evidence to rebut the presumption accorded by section 355.1, subdivision (d). Father's expert and the DCFS investigator both testified that minor would not be in physical danger or sexually abused if placed with father. This evidence was sufficient to rebut the presumption of juvenile court jurisdiction. Although father met his burden of producing evidence sufficient to rebut the presumption accorded by his conviction as a sex offender, the record contains substantial evidence, apart from father's conviction, to support the juvenile court's jurisdictional findings. Father's own expert admitted that father had demonstrated a lack of understanding as to what constituted age appropriate conduct for a child, and that father had exercised poor

---

[6] Minor suggests that the juvenile court improperly applied the section 355.1, subdivision (d) presumption based on the erroneous conclusion that father had been found to be a registered sex offender in mother's companion case. In the proceedings below, minor's counsel pointed out that no such finding had been made in mother's related case. Counsel further argued that because father was not a party in mother's companion case, relying on findings in that case as a basis for adjudicating the issues in minor's case presented due process concerns. Evidence of father's status as a registered sex offender came not from mother's related dependency case, however, but from father's criminal case. The juvenile court took judicial notice of the order in father's criminal case requiring him to register as a sex offender. The presumption accorded by section 355.1, subdivision (d) therefore applies.

judgment by having sexual relations with a 13-year-old and by disclosing his paternity to school officials. Father's expert also testified that he believed father's contact with minor should be supervised and that he was not recommending that minor be returned to father's custody at this time.

The DCFS investigator testified that father's decision to engage in sexual relations with a 13-year-old child was evidence of his poor judgment, his lack of understanding concerning the developmental stages of a child, and his inability to determine what would be age appropriate conduct for minor. The investigator concluded that minor would be at substantial risk of harm in father's care and opposed releasing minor to father until father had complied with the terms of his probation, including completing a 52-week parenting course, and participated in monitored visits with minor. The testimony of father's expert and that of the DCFS investigator constitute substantial evidence in support of the juvenile court's jurisdictional findings.

III. Dispositional Findings

Section 361 authorizes the removal of a child from a parent's physical custody if the juvenile court finds, by clear and convincing evidence that a substantial danger exists to the child's physical or emotional well-being: "A dependent child may not be taken from the physical custody of his or her parents . . . unless the juvenile court finds clear and convincing evidence . . . [t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . custody. (§ 361, subd. (c)(1).)

Substantial evidence supports the juvenile court's dispositional findings. As discussed, father's own expert testified that father needed to be supervised in order to parent minor properly. Father's expert also made clear that he was not recommending that minor be released to father at this time. The DCFS investigator also testified that father had demonstrated a lack of understanding concerning child development and age

appropriate conduct for a minor, and concluded that minor would be at substantial risk of harm in father's care.

IV. Alleged Judicial Misconduct

Appellants contend the juvenile court improperly based its jurisdictional and dispositional rulings on two sources of external information -- opinions of child psychologists who were not witnesses in the case, but who had spoken at judicial seminars, and testimony adduced during mother's related dependency case -- rather than the evidence presented at the adjudication/disposition hearing. Appellants further contend the juvenile court demonstrated bias against father. As we discuss, the juvenile court's statements regarding these outside sources of information, while maybe helpful for an understanding of the topic, are not pieces of evidence properly considered in this case and do not constitute reversible error or support appellants' claim of bias.

A. Opinions of Child Psychologists

At the conclusion of the jurisdiction/disposition hearing, the juvenile court stated its reasons for sustaining the section 300, subdivision (b) allegation in minor's petition. The court explained that father's expert had hurt, rather than helped father's case by testifying that minor should not be returned to father's custody at this time and that both parents needed services in order to care properly for minor. The juvenile court further stated that father had demonstrated a lack of understanding concerning age appropriate conduct for a child and that father's expert failed to address this issue. The court explained: "What he missed from his testimony, and I think for all of us who have been through training on child brain development [k]now, is that as they are doing brain scans and learning more about brain development and we're learning the degree to which our laws have it right. The whole thing about the frontal lobe being the last thing to develop is good news for father because he has not quite fully developed yet because your brain won't fully develop until you're age 26. And according to recent studies the last piece to develop is judgment. You just don't fully develop as much judgment as you'll have in life until that is fully grown and it's at approximately age 26. . . . So this is really a case where someone, [father], doesn't understand what is age appropriate . . . . I didn't hear

anything from the psychiatrist to acknowledge this. . . . I haven't heard anything to indicate that father's got some concept. Not that it's illegal. Not that it's morally wrong . . . but that children are children and are incapable of making decisions. . . . What most child psychologists will say, those who specialize in abuse of children, is that the number one indicator for somebody who will abuse a child or let a child be abused is the incapability or nonunderstanding of what is age appropriate."

The juvenile court later identified the child psychologists the court had referred to during its discussion on child brain development: "I wanted to clear up the record slightly. What I was talking about brain development and quoting somebody, it was Abigail Baerd[,] Assistant Professor of the Department of Psychological and Brain Sciences and the Director of the Laboratory for Developmental Neuroscience at Vassar College. She spoke at Beyond the Bench. . . . Dr. Hope Goldberg recently presented to the judicial officers. I arranged for that. She's the visiting professor from U.S.C. and came to the same conclusions. We had another professor of brain development at the partnership conference this past year who agrees again on the frontal lobe development and the importance of realizing that we have children who can't make judgments or even make good judgments well into their teens."

The juvenile court's statements concerning the opinions of child psychologists who were not witnesses in this case, while improper, do not provide a basis for reversing the judgment. The record contains substantial evidence, wholly apart from the juvenile court's statements concerning child psychologists who did not testify in the case, to support the court's jurisdictional and dispositional findings. In light of this substantial evidence, we conclude that no miscarriage of justice occurred, even assuming the juvenile court improperly considered outside sources of information as a basis for its decision. (*In re Celine R.* (2003) 31 Cal.4th 45, 60.)

B. Testimony From Mother's Related Case

Appellants contend the juvenile court improperly relied on testimony adduced during mother's related dependency case as evidence of father's poor judgment. At the adjudication hearing, the court explained: "I just know that sometime unless [father's]

got the proper therapy and unless he has gotten the proper parenting classes he's going to do something just as stupid as what he has already done and he's done several stupid things -- amazingly stupid things. . . . But what I was looking for in particular to see in this file . . . the whole fight with the mother fighting over, you know, a baby in public. I thought that was dangerous to the child. Granted the grandmother was doing most the screaming and yelling. Father could have backed down but he didn't." Father's counsel objected that nothing in the record indicated that father had done anything to aggravate the dispute with the maternal grandmother, and the following exchange ensued:

"[Father's counsel]: I would point to the last report regarding that event and ask the court to read it before making those statements. I don't believe there's anything in the police report to indicate that the father in any way aggravated or allowed it to continue. . . .

"[The court]: I know he kept insisting he was the father, even though he knew how it was upsetting the grandmother.

"[Father's counsel]: There's nothing in the police report about the father insisting. . . .

"[The court]: I did hear testimony in the other case too, so maybe I'm remembering things that are not in the police report. In any event, I'm sustaining a [section 300, subdivision] (b) [allegation in the petition]."

To the extent that the juvenile court relied on testimony adduced during mother's related dependency case as the basis for its jurisdictional and dispositional findings in this case, the error, if any, was harmless. In view of the substantial evidence in support of the court's jurisdictional and dispositional findings, it is not reasonably probable that, but for the error, the result would have been more favorable to father. (*In re Celine R.*, *supra*, 31 Cal.4th at p. 60.)

C. Bias

Appellants contend the juvenile court's reference to the opinions of child psychologists who were not witnesses in this case evidenced judicial bias against father. A bench officer's legal error does not amount to bias unless it indicates a "whimsical

disregard" of the legal scheme "that is incompatible with a judicious effort to comply with its complex terms." (*People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562; *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1231 ["mere judicial error is not conclusive evidence of bias or grounds for disqualification"].) "A judge's impartiality is evaluated by an objective, rather than subjective, standard." (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346.) The question is whether a reasonable person "would entertain doubts concerning the judge's impartiality." (*Hall v. Harker*, at p. 841.) The juvenile court's references to child psychologists who were not witnesses in the case, while improper, do not suggest that the court disregarded the evidence presented or the applicable legal scheme.

Appellants claim that the juvenile court's "fixation" on father's past conduct with mother was further evidence of the court's bias against father. Critical comments and "expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom," however, do not demonstrate bias. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) A judicial officer "'will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case, and do not constitute a ground for disqualification.' [Citation.]" (*Haldane v. Haldane* (1965) 232 Cal.App.2d 393, 395.) In this case, appellants failed to demonstrate any bias inconsistent with judicial objectivity on the part of the juvenile court.

DISPOSITION

The orders establishing juvenile court jurisdiction over minor and removing him from father's custody are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST